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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 834

VIRGIL FLOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-10a) is reported at 228 F. 2d 913.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 10a) was entered January 13, 1956. A petition for rehearing was denied on February 9, 1956 (Pet. App. 11a). On March 5, 1956 the time for filing a petition for a writ of certiorari was extended to April 9, 1956, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether venue of a prosecution for obstructing, delaying or affecting commerce by extortion or robbery in violation of 18 U.S.C. 1951 lies in the district where the commerce is obstructed, delayed or affected, particularly where the initial threat was made in that district.

2. Whether the indictment was deficient in alleging that the extortion was practiced upon "contractors", defined as a co-partnership composed of three members, without specifying the particular partner through whom the threats were conveyed.

3. Whether the evidence was sufficient to establish that petitioner received money.

4. Whether 18 U.S.C. 1951 has been implicitly repealed by Section 302(b) of the Labor Management Relations Act.

STATUTES INVOLVED

18 U.S.C. 1951 provides:

> § 1951. Interference with commerce by threats or violence.
>
> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined

not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15,

sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. 3237 provides:

> § 3237. Offenses begun in one district and completed in another.
>
> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Illinois of obstructing, delaying and affecting commerce by extortion in violation of 18 U.S.C. 1951, *supra*, pp. 2-4 (also known as the Hobbs (Anti-Racketeering) Act) in that, beginning in April 1952, petitioner, in his purported capacity as a labor union representative, by the wrongful use of force and fear, extorted $2,650 from the "contractors", a partnership in the pipe stringing business (R. 4-8, 155, 177). He was sentenced to imprisonment for

2 years (R. 183-184). On appeal the judgment was affirmed (Pet. 10a).

The evidence for the government may be summarized as follows:

Sinclair Pipe Line Company of Independence, Kansas, a subsidiary of Sinclair Oil Company, was, in the year 1952, engaged in the construction of an interstate pipe line extending from Oklahoma, across Kansas, Missouri and Illinois to its terminus at East Chicago, Indiana (R. 24). The total cost of the pipe line construction was estimated at $52,000,000 (R. 24). All the construction in Illinois was in counties located in the Southern District and was under the direction of the O. R. Burden Construction Corporation (R. 25).

J. L. Cox and Son, a partnership comprised of Leroy Cox, Martin Shay and Morris Stout, specialized in pipe stringing (R. 39), *i.e.* transporting pipe and pipe line equipment to the pipe line right of way where it is accurately placed in order that the construction contractor can weld the segments together with a minimum of handling (R. 40). The partnership had a prime contract with the Sinclair Pipe Line Company for unloading pipe from railroad cars and a subcontract with O. R. Burden Construction Corporation for stringing pipe along the right of way from Salisbury, Missouri, to East Chicago, Indiana (R. 25, 41-43). In fulfillment of its contracts, the partnership would transport men and materials from Oklahoma, Kansas, and Missouri into Illinois (R. 43) and at various times it was

necessary to move pipe back and forth between Missouri and Illinois (R. 43).

Petitioner was the Secretary-Treasurer and business manager of Local 179 of the International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers with an office located in Joliet, Illinois (R. 91-93).

Morris Stout (one of the partners of J. L. Cox & Sons) met petitioner for the first time in the spring or early summer of 1952 at Pontiac, Illinois in the Southern District of Illinois (R. 43, 93). At that time Stout told petitioner that his company had an unloading contract with Sinclair and was negotiating for a pipe stringing contract with Burden (R. 43-45, 93-94). Stout's purpose in meeting petitioner was to secure permission to use the company's regular truck drivers employed by the partnership in the unloading operation (R. 44-45, 93-94). In granting this request, petitioner stated "You go ahead with the unloading, but if you get the stringing, you come see me before you start" (R. 45).

After J. L. Cox & Sons had been awarded the contract for the stringing operation, Stout met petitioner on August 29, 1952 in the latter's office at Joliet, Illinois in the Northern District of Illinois (R. 45, 95-96). Stout testified that he told petitioner he came because of the latter's statement during their meeting at Pontiac, Illinois, whereupon petitioner said, "Well, Mr. Stout, I will give you one thing to understand before you come in here and use your men, its going to cost you. * * *

I have dealt with a lot of contractors. I have seen a lot of their hides on a fence * * * And I will probably see some more. * * * It's going to cost you $25.00 a mile to use your regular drivers and for me not to cause you any trouble in my jurisdiction" (R. 46-47). Stout further testified that petitioner explained what he meant by trouble. "He would put helpers on our trucks, swampers on our trucks. In other words, cripple our payroll," (R. 47) and "he would run our own men off, our regular drivers, he wouldn't let them drive" (R. 60). Then, when Stout agreed to make the payment demanded, petitioner examined a map and determined that since 106 miles of pipe would be laid in his jurisdiction, the total payment, at $25 per mile would be $2,650 (R. 47). Stout, at that time, drew a personal check made payable to cash for $850 which he gave to petitioner as a down payment on the total amount demanded and promised to pay the balance before the job was completed (R. 47-48).

Stout informed his partners, Cox and Shay, of the arrangement he had made with petitioner (R. 48, 54-55). On November 22, 1952, prior to completion of the job, Stout and Shay met petitioner at his office in Joliet, Illinois, at which time they informed him that the job was nearly completed and that they were prepared to give him a check for $1,800, the unpaid balance of his demand (R. 50). Petitioner, after informing Stout and Shay that he had never cashed Stout's check for $850 because he figured "it was too risky to do it," refused to take their check for $1,800 saying, "No, I

won't take it, I've got to have the cash" (R. 50-51). When Stout told petitioner that he could not get cash that day, petitioner agreed to pick up the $2,650 in cash when he made a trip he planned to Kansas City, Missouri (R. 51).

Petitioner and his wife went to Kansas City, Missouri, on November 25, 1952. On arrival, petitioner telephoned Shay and arranged to meet him at the Union Station (R. 70, 100-101). Shay instructed the bookkeeper for J. L. Cox & Sons to make out and cash at the bank a check for $2,650 (R. 69). When Shay had received the $2,650 in cash he went to the Union Station in Kansas City where he met petitioner and his wife (R. 69-70). Shay and petitioner went to the men's rest room and into a pay toilet where Shay handed petitioner an envelope (R. 70). When petitioner asked Shay if it was there, Shay said, "Yes, sir. If you don't think so, sit down there and count it," whereupon petitioner replied, "No, that's okay" (R. 70). Petitioner then gave Shay the check for $850 which Stout had previously given him at Joliet (R. 71). Shay and Cox gave the $850 check to Stout in the hospital where Stout had gone on his return from Joliet and watched Stout destroy it (R. 71-72, 77-78).

ARGUMENT

1. Petitioner's principal contention (Pet. 9-22) is that venue was improperly laid in the Southern District of Illinois, even though, admittedly, the effect on commerce was in that district, because the threats and payment were made elsewhere.

The whole argument rests on a questionable fac-

tual premise that petitioner's initial conversation with Stout, *supra*, p. 6, when the Cox company had the stringing contract under discussion, but had not yet obtained it, was not a part of the extortion element of the crime. As the court below pointed out (Pet. App. 7a-8a), petitioner's statement at that time, "if you get the stringing, you come and see me before you start", when considered in the light of all the facts, could properly be considered part of the plan and purpose to extort that "had its inception in Pontiac [in the district of trial], was carried forward at Joliet and was later consummated in Kansas City, Missouri." The fact that the threat was couched in innocent sounding phraseology is obviously not conclusive, since the evidence shows that petitioner and the contractor understood it to be in essence a threat. See *Callanan v. United States*, 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862, rehearing denied, 350 U.S. 926, where the actual phraseology used was also not in terms a threat. Similarly, the fact that the contract had not yet been secured is not conclusive, since the threat was made against the known possibility that the contract would be awarded to petitioners and was meant to be effective when that occurred. Thus, even if prosecution of a Hobbs Act violation had to be brought in the district where the threats which constitute extortion are made, venue in the Southern District of Illinois was proper.

In any event, venue was properly laid in the Southern District because part of the offense—ob-

struction of commerce—occurred there. The Hobbs Act, so far as pertinent here, has two elements—extortion or robbery *and* obstruction or delay of commerce. Just as obstruction or delay of commerce would not comprise the crime, absent the element of robbery or extortion, so robbery or extortion standing alone would not constitute the crime without the elements of obstruction or delay of commerce. The court below correctly recognized this dual facet when it stated (Pet. App. 10a):

> Thus, the offense consists of two essential elements, (1) extortion or attempted extortion, and (2) that such extortion or attempted extortion affect interstate commerce.

Where a crime is of such nature that each of its separate elements may occur in different districts, it is constitutionally proper to lay venue in the district where any of the material or essential elements took place. *Armour Packing Co.* v. *United States,* 209 U.S. 56, 73-77; *United States* v. *Anderson,* 328 U.S. 699, 705. While recognizing that questions of venue in criminal cases are not merely matters of formal legal procedure, but concern deep issues of public policy, this Court in *United States* v. *Johnson,* 323 U.S. 273, 275, nonetheless recognized the broad power of Congress to fix venue wherever a crime was committed, when it wrote:

> * * * By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over

the whole area through which force propelled by an offender operates.

The first part of 18 U.S.C. 3237, *supra*, p. 4, is a specific enactment by Congress providing that offenses commenced in one district and completed in another, or committed in more than one district, may be prosecuted in any district in which any element of the offense occurred.

It is, of course, recognized that this prosecution could have been instituted in the Northern District of Illinois where the demand was made for $2650 and where the payment was tendered by check, or in the Western District of Missouri where the $2650 in cash was given to petitioner. The second, or completing element of the crime, however, *i.e.*, the obstruction of commerce, occurred in the Southern District of Illinois. The obstruction of commerce was as much a part of this crime as is the death of a victim in a murder case. The situs of the harm or consequence of the extortion was, therefore, a proper venue under 18 U.S. 3237 for the prosecution in this case.

2. There is no substance to petitioner's argument that the indictment was fatally defective by reason of its failure to aver the name of the person who was the victim of the alleged extortion. The indictment charges that the extortion consisted of obtaining $2650.00 from "the contractors," who are defined as "a co-partnership composed of one J. Leroy Cox, one Martin Shay, and one Morris Stout, doing business under the style and name of J. L. Cox & Sons Pipe Stringing Corporation."

The indictment alleges, what the proof established, that the partnership as such, rather than an individual partner, was the victim of the extortion. Hence it would have been misleading to allege as the victim the individual partner through whom the threats to the firm were conveyed.

The indictment is sufficiently precise to inform petitioner of the elements of the crime charged, to enable him adequately to prepare his defense, and to protect him from a second prosecution for the same offense. It was therefore legally sufficient. See *United States* v. *Debrow*, 346 U.S. 374; *Hagner* v. *United States*, 285 U.S. 427.

3. Petitioner's attack on the sufficiency of the evidence to show payment of the money to him (Pet. 23-24) is without merit. The evidence adduced at the trial was sufficient to prove that petitioner received $2650 from Shay in the Union Station in Kansas City. The testimony of Martin Shay was that, on receiving a phone call from petitioner, he had his bookkeeper cash a check for $2650 at the bank and that, on receiving the money, he put it in an envelope which he carried with him to the Union Station in Kansas City and handed it over to petitioner. As Shay gave the envelope to petitioner, petitioner asked if it was there. When Shay said "Yes, sir. If you don't think so, sit down there and count it," petitioner answered "No, that's okay."[1] (R. 69-71.)

[1] When the prosecutor questioned Shay, the following colloquy occurred:

"Q. At the time you gave Mr. Floyd the $2,650.00——
"A. He gave me back a check." (R. 71.)

The entire testimony of Shay constitutes substantial evidence from which the jury could properly conclude that petitioner did receive the money. *Glasser* v. *United States,* 315 U.S. 60, 80; *Hulahan* v. *United States,* 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856.

4. Petitioner's contention that the enactment of the specific provisions of Section 302(b) of the Labor Management Relations Act (29 U.S.C. 186 (b)) constitutes an implicit repeal of 18 U.S.C. 1951 in so far as representatives of employees employed in an industry affecting interstate commerce are concerned, is untenable.[2] The Hobbs Act, by its terms, punishes acts of extortion and robbery. Section 302(b) of the Labor Management Relations Act punishes representatives of employees who accept money from the employers of such employees. If the employer paid money to petitioner as a bribe or gift, he did not, *a fortiori,* pay it under the duress requisite to extortion, and if he paid it under duress it was not paid as a bribe or gift. Bribery and extortion are mutually exclusive crimes. *People* v. *Feld,* 262 App. Div. (N.Y.) 909 (1941); *Hornstein* v. *Paramount Pictures, Inc.,* 292 N.Y. 468 (1944). Because different acts are punished by these two statutes, no basis exists for claiming that they are mutually repugnant. The same issue in a variant form was raised and rejected in *Bianchi* v. *United States,* 219 F. 2d 182

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[2] The present Title 18 was enacted in 1948 and the Labor Management Relations Act in 1947.

(C.A. 8), certiorari denied, 349 U. S. 915, and *Callanan* v. *United States,* 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862, rehearing denied, 350 U. S. 926. See also *United States* v. *Ryan,* 350 U. S. 299.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

May 1956.

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No. 834

In The

Supreme Court of the United States

October Term, A. D., 1955.

VIRGIL FLOYD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

I. HARVEY LEVINSON,
FRANK J. McADAMS, JR.,
33 North La Salle Street,
Chicago 2, Illinois,
Attorneys for Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

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SUMMARY: *Johnson* v. *United States* (No. 643) and *United States* v. *Patteson* (No. 704) 24 U.S.L. Week 4263 (U.S. 5-21-56) clearly establishes that the Court of Appeals (228 F. 2d 913) erred in holding that the petitioner was triable in the Southern District of Illinois. 2

Earlier, in *United States* v. *Quarles*, 350 U. S. (No. 2) 11, 16, this court adhered to the constitutional safeguards prohibiting trials in a foreign district. Further, until *United States* v. *Green*, 350 U. S. (No. 6) 15, was authoritatively settled, it was necessary to present and argue certain questions not theretofore decided by this court. Such extensive argument on other issues probably overshadowed the salient question involved here. 3

Therefore, certiorari ought to be granted, limited, however, to the following question:

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"In a criminal prosecution for extortion under 18 U.S.C.A. 1951 (Hobbs Act) is the venue of such offense co-extensive with the commerce which may be affected thereby and can the provisions of 18 U.S.C.A. 3237 be applied to sustain the venue in a district through which such affected commerce runs, even though the alleged threats and payment of money occurred in other districts?"

These intervening circumstances and the importance of the questions involved in the administration of justice ought to afford a basis for a re-hearing, particularly since the government does not contend that commerce was actually affected. 4, 28

The Court of Appeals erroneously held that when a contractor's operations are in interstate commerce, then such operations affect commerce, and any extortive demand upon the contractor not only affects commerce but venue lies in any district wherein the contractor operates. 4-5

In arriving at this conclusion, the Circuit Court of Appeals erroneously applied 18 U.S.C.A. 3237, and held that it was applicable to "any offense involving * * * transportation in interstate or foreign commerce," whereas the section reads: "any offense involving the use of the mails or transportation, etc."

The reviser's notes show that Section 3237 was adopted to cure procedural defects pronounced in *Johnson*, 323 U.S. 273, and was intended merely to proscribe the illegal *use* of transportation facilities—an in-transitu offense. Congress lodged jurisdiction only in the districts through which an article actually moved. 6-7

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Historically, the word "transportation" has meant the employing of commerce to carry a prohibited thing. The reviser's notes and decisions of this court show that Congress in employing the word transportation intended to employ it as construed in *Johnson* and to accord with its historical significance. 8

The construction placed upon the Act by the Court of Appeals is erroneous and can only lead to incongruous results and consequences not intended by Congress nor consonant with constitutional safeguards in questions affecting venue. 9-10

18 U.S.C.A. 1951 is merely a Federal extortion statute proscribing extortion from persons engaged in interstate commerce and by reason whereof interstate commerce may be said to be affected. Congress intended that extortion should be governed by common law principles as applied and defined under the laws of the State of New York. 11

Extortion is an *instantaneous* and not a *continuous* offense and hence venue can only be laid in the district where the extortion is committed although events preceding completion of the offense may be admissible in evidence merely for historical purposes. 11, 14-16, 21

Title 18, U.S.C.A. 1951, and its forerunner, the Anti-Racketeering Act of 1934, and the amendatory Hobbs Act of 1946 is merely the creation of an extortion statute from those who extort money from those engaged in interstate commerce. 11

The gist of the unlawful act is extortion. 12, 23

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The District Attorney and both courts below came to the conclusion that the gist of the offense was not extortion but the obstruction of commerce by extortion so that venue lies where the commerce may be affected. 5, 12

There are no federal common law offenses and adoption by Congress of common law crimes are governed by common law principles. 12

At common law intent is an inherent part of the crime and such intent must be coupled with an unlawful action—a subsequent felonious intent can not render a previous act felonious. 13

The Court of Appeals held that the threatening statements in connection with a stringing contract'' were not made in the Southern District of Illinois where petitioner was tried but in the Northern District of Illinois, and the alleged payments were made in Missouri. 13

In April, 1952 J. L. Cox & Sons of Raytown, Missouri, had a contract with the Sinclair Company for ''storing'' pipes in connection with the construction of an interstate pipe line. 13

Petitioner is a union official, and when the operations of Cox & Sons reached petitioner's territory, Stout, a partner of Cox & Sons, arranged a meeting with the petitioner at Pontiac, Illinois. Stout told the petitioner that Cox and Sons had a small amount of pipe which was necessary to be hauled by truck and requested to use the firm's regular drivers. Defendant told him to go ahead inasmuch as the job did not amount to much. Stout also told the defendant that they were figur-

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ing on a job to "string" pipe but they would not know until later if they could get the job and inquired about using local men. Defendant then told him that if they were available he would put them on, otherwise the contractor would have to bring in his own men. Petitioner said "If you get the stringing you come and see me before you start." Cox and Sons had neither the contract nor the expectancy of a contract for the stringing of pipes. The storing contract came to an end without incident before any stringing contracts were let. On May 12, 1952—at the earliest—Sinclair awarded a contract to Britton Bros. contracting for the stringing of pipes from Forest City, Illinois to East Chicago, Indiana. Britton Bros. sublet this contract to O. R. Burden Construction Company. Some time in July or August the subcontractor, Burden, re-let the contract to Cox and Sons, who had bid for the same. The contractor moved no men or equipment until July or August, 1952. August 29, 1952, Stout again called on petitioner at Joliet, Illinois (Northern District of Illinois) where the alleged extorted demand was made and later allegedly satisfied in Kansas City, Missouri. 12, 13, 25-28

The Court of Appeals, appreciating the infirmity of the Government's case to establish venue in the Southern District of Illinois where the first meeting occurred which had to do with the storing of pipe, erroneously concluded, nevertheless, that this meeting "gives rise to a strong inference . . . that the plan or purpose to extort had its inception in Pontiac . . ." 228 F. 2d 913. 28

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But the indictment charges extortion. 25

What the Court of Appeals meant to imply by "inference" is that circumstantial evidence was involved. The District Attorney upon the trial insisted that no question of circumstantial evidence was involved, and the trial court refused defendant's Exhibit 11 on circumstantial evidence. 28

But at this first meeting the subject matter discussed was the "storing" contract which came to an end without incident and at that time Cox and Sons had neither a contract nor the expectancy of a contract for stringing pipe, which was the subject matter of the alleged demand. Therefore, at that time there was an absence of both an extortive demand and an interstate contractor upon whom such demand could be made for the purpose of establishing an offense cognizant under Federal law. 12, 17, 18-21

Further, extortion and attempted extortion are instantaneous and not continuing offenses. Attempted extortion is complete with the making of the demand and not before, and extortion is complete with the taking and not before. 14, 16-21

While evidence of the meeting at Pontiac was admissible for historical purposes only, since there had not been and could not be some appreciable fragment of the offense committed at the time of the Pontiac meeting, it therefore could not be said to have been the beginning of the offense. 17

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Such has been the uniform holding of both the State and Federal courts. Moreover, the situs of the offense is fixed by the statute, namely, the place where an extortive demand is made affecting commerce. In any event, the conversation between defendant and the contractor at Pontiac, Illinois constituted no part of the crime itself even it be assumed *arguendo* that it was preparatory thereto. 10, 19-28

In the words of Mr. Justice Holmes, dissenting, in *Hyde* v. *U. S.*, 225 U.S. 347, 360:

> "I can think of no other case in which it would be argued that an act constituting no part of a crime charged draws jurisdiction to the place where it was done . . . it would be an amazing extension of even the broadest form of conviction if it should be held that an otherwise innocent overt act done in one state drew to itself a conspiracy in another state . . ." 25

The opinion of the Court of Appeals leaves the law in a rather ambiguous state which ought to be resolved by this Court both in the interest of an orderly and uniform administration of criminal justice throughout the United States and in the exercise of its supervisory powers over Federal criminal procedure. 28

Accordingly, the petition for a writ of certiorari should be granted but restricted to the first question presented in said petition. 29

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In The

Supreme Court of the United States

October Term, A. D., 1955.

VIRGIL FLOYD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Virgil Floyd, petitioner, prays that this Court grant rehearing of its order of May 21, 1956, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit as prayed for in the petition filed on April 9, 1956, herein, and limited to the first question presented in said petition.

Reasons for granting rehearing and issuing of the writ:

I.

On May 21, 1956 in *Johnston* v. *United States* (No. 643) and in *United States* v. *Patteson* (No. 704), 24 U.S.L. Week 4263, this court held:

> " • • • where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime. • • • Article III of the Constitution and the Sixth Amendment fix venue 'in the State' and 'district wherein the crime shall have been committed.' The venue of trial is thereby predetermined, but those provisions do not furnish guidance for determination of the place of the crime. That place is determined by the acts of the accused that violate a statute. This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused. Cf. *United States* v. *Anderson*, 328 U. S. 699, 705. A variation from that rule for convenience of the prosecution or the accused is not justified. The result would be delay and confusion."
>
> "This rule was followed in *United States* v. *Johnson*, 323 U. S. 273, relied on by the registrants, where a maker and shipper of dentures mailed in Illinois was charged in Delaware, the State of receipt by a consignee, with violating the law by 'use' of the mails 'for the purpose of sending or bring into' a State such dentures. *Id.*, at 274. This Court, by interpretation of the statute, restricted prosecution of the shipper to the State of the shipment saying:
>
> 'It is a reasonable and not a strained construction to read the statute to mean that the crime of the sender is complete when he uses the mails in Chicago, and the crime of the unlicensed dentist in California or Florida or Delaware, who orders the dentures from Chicago, is committed in the State into which he brings the dentures. As a result, the trial of the sender is restricted to Illinois and that of the unlicensed dentist to Delaware or Florida or California.' *Id.*, at 277-278."

On November 7, 1955 in *United States* v. *Quarles*, 350 U.S. (No. 2) 11, 16, this court held:

> "But the Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, even though wholly independent. They further provided that no person should be held to answer in those courts for capital or other infamous crimes unless on the presentment or indictment of a grand jury drawn from the body of the people. Other safeguards designed to protect defendants against oppressive governmental practices were included. One of these was considered so important to liberty of the individual that it appears in two parts of the Constitution. Article III, § 2, commands that the 'Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.' And the Sixth Amendment provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.' This right of trial by jury ranks very high in our catalogue of constitutional safeguards."

These cases clearly establish that the Court of Appeals (228 F. 2d 913) erred in holding that the petitioner was triable in the Southern District of Illinois and misconstrued both the application of *Johnson* (323 U.S. 273) and Section 3237 Title 18 USCA adopted to conform with *Johnson* in making the *user* of proscribed mails or carriage (transportation) triable in the district through which such carriage takes place without offending constitutional safeguards. Perhaps our original petition did not sufficiently emphasize this phase of the case because until *United States* v. *Green*, 350 U.S. (No. 6) 415 was authoritatively settled, it was necessary to present and argue certain questions not theretofore decided by this court. Such extensive argument probably overshadowed the salient issue presented by the original petition for certiorari namely:

> "In a criminal prosecution for extortion under the Hobbs Act, is the venue of such crime coextensive with the commerce affected thereby and can the provisions of 18 U.S.C.A. 3237 be applied to sustain the laying of venue in a district through which such affected commerce runs even though the alleged threats and payment of money occurred in other districts?"

The *Johnston, Patteson* and *Quarles* cases leave no doubt that absent a special venue statute the venue in a criminal prosecution must be laid in the district in which the offense was committed. The government asserts that Title 18 U.S.C.A., Section 3237 which provides:

> "Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense, and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

furnishes a special venue statute which controls the district of trial in the instant case.

The Government does not contend that commerce was actually delayed, obstructed or affected in the instant case (R. 21, 60, 127, 164-165). What the Government does say is that whenever an extortive demand is made upon an interstate contractor, then the commerce is affected and venue is coextensive with the area of the contractor's operations (R. 164, 170). The Court of Appeals erroneously came to the same conclusion 228 F. 2d, 913, 916. But this court has recently held "• • • in our view the legislation is directed at the protection of interstate commerce against extortion." *United States* v. *Green*, 350 U.S. (No. 6) 450; 76 S. Ct. (No. 11) 527, 526. (March 26, 1956). See, *e.g. Browder* v. *United States*, 312 U.S. 335 (1935) wherein this court held that the offense of securing a passport by false statements and the subsequent *use* thereof are separable offenses.

The Court of Appeals held (228 F. 2d at 918):

> "Moreover, we agree with the theory of the trial court that venue under the statute involved may be laid in any jurisdiction where commerce is affected. We have already sustained the government's contention that commerce was obstructed, interfered with and affected within the Southern District of Illinois.[1] While no case is called to our attention and we find none on the point, we think it plain that it was the intention and purpose of Congress to authorize the laying of venue in any District wherein commerce is affected, and this irrespective both of defendant's residence and the place where the coercive threats are made. The second paragraph of Title 18 U.S.C.A. Sec. 3237 provides in part:
>
> > " 'Any offense involving * * * transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce * * * moves.'
>
> "The question as to the applicability of this provision appears to depend upon whether the instant offense involves 'transportation.' "

It is to be observed that the Court of Appeals deleted the words "*the use of*" where asterisks appear in the opinion.

Our inquiry must be into what Congress meant by the use of the phrase "involving . . . transportation. . . ." It

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[1] The Circuit Court of Appeals in sustaining "the government's contention" did not hold that commerce was **actually** affected but held that since Cox & Sons' "operations were engaged in interstate commerce; * * * * it is certain that such operations had a direct bearing upon and affected such commerce" (228 F. 2d at p. 916), a fortiori, a mere extortive demand upon Cox & Sons affected commerce. **Id.** at 918. See also "Instructions" R. 148 to same effect.

is to be observed that the Court of Appeals read this phrase as "affecting . . . transportation . . ." and not as it appears in Section 3237.

Section 3237 was adopted by Congress to cure the procedural defect they thought apparent from this court's decision in *United States* v. *Johnson, supra.* In that case this court held that the shipment through the mails of illegal matter could be inquired of in the state wherein the matter was deposited or the state wherein the matter is received. The court, however, recognized that Congress could provide that venue be had in any district through which the prohibited matter moved. This court said "by using the doctrine of a continuing offense Congress may, to be sure, provide that the locality of the crime shall extend over the whole area through which *force propelled* by an offender operates."

* * * * * *

> "Thus an illegal *use* of the mails or instruments of commerce may subject the *user* to prosecution in the district where he sent the goods or in the district of their arrival or in any intervening district."
>
> "It is significant that when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States through which a process of wrongdoing moves."

Mr. Justice Reed, dissenting in *Johnson,* 323 U.S. at 281, stated:

> "The statute condemns as unlawful the 'use' of 'the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State' the prohibited dentures. It is not the deposit of the article or its delivery which is forbidden but the *use* of the transportation facilities.

"The sending or bringing of the dentures is not denounced as a substantive crime apart from the *use* of mails or instrumentalities to accomplish the purpose. The crime consists of the *use* of the mails to send a prohibited denture 'into' or bring it 'into' another State. The language leads us to the conclusion that a *use* for the prohibited purpose occurs at whatever place the proscribed denture is handled by the mails or an instrumentality of commerce.

"The '*use*' for the 'purpose' results in a continuous offense. Since the offense is committed wherever the mails or the instrumentalities of interstate commerce are used for the purpose of sending or bringing the denture into a state contrary to the statute and the act has no provision otherwise limiting the place of trial, the venue is at whatever" . . . (Emphasis added)

Following the *Johnson* case Congress adopted Section 3237 of Title 18. The reviser's notes to that section of the criminal code state:

"this paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in *United States* v. *Johnson*, 1944, 65 S. Ct. 249, 89 L. Ed. 236, which turned on the absence of a special venue provision in the Dentures Act, Sec. 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions except in cases where congress desires to restrict the prosecution of offenses to particular districts as in Sec. 1073 of this revision. 80th Cong. House Rep. No. 304."

It is apparent, therefore, that Congress sought to invest those districts through which an article actually moved with authority to inquire into an offense involving the movement of the article.

It is submitted, therefore, that what Congress intended by the phrase "involving . . . transportation . . ." is the carriage of prohibited matter in interstate commerce and not anything which affects that carriage.

Historically the word "transportation" has meant the employing of commerce to carry a prohibited thing—an in-transitu offense. cf. *Armour Packing Company* v. *United States,* 209 U.S. 56; *Grogan* v. *Hiram Walker & Company,* 42 S. Ct. 423, 259 U.S. 80; *Gregg* v. *United States,* 113 F. 2d 687, Title 18 U.S.C.A. Section 2421-2423 (White Slave Traffic Act).

Thus, historically, transportation which involves an offense is the carrying into a state of a prohibited article of commerce. Even the interstate commerce act 49 U.S.C.A., Sec. 1 with its broad definition of transportation embraces the use of a facility to carry a specific article.

Therefore we submit that it was the intent of Congress to vest venue in those districts through which a prohibited article was moved and not to vest venue in those districts which were affected. This interpretation of Section 3237 is consonent with the reviser's notes and historical development of the term transportation. This court has consistently held that these two elements afford the proper standard for statutory interpretation. *Affronti* v. *United States,* 350 U.S. (No. 3) 79.

Affronti is only an affirmation of long settled canons applied by this court in construing or interpreting statutes:

> " • • • meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the law was employed." • • • *Vermilya-Brown* v. *Connell,* 335 U.S. 377, 386, 387, (1948).

"In adopting the language used in the earlier act Congress 'must be considered to have adopted also the construction given by this court to such language and made it a part of the enactment.' * * *" *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948). Questions of construction "must be answered primarily from the history, terms and purposes of the legislation." *N. L. R. B.* v. *Hearst Publications*, 322 U.S. 111, 124 (1944). cf. *United States* v. *Ganaposki*, 72 F. Supp. 982, 985 (M.D.Pa. 1947) where the court stated:

> 'Nothing is better settled than that statute should be sensibly construed with the view of effectuating legislative intent.' *Williams* v. *Fidelity Co.*, 236 U.S. 549 at p. 555.

"* * * * Statutes should be faithfully observed and interpreted without sacrificing the legal or constitutional rights of the accused."

The construction placed upon the act by the Court of Appeals was never intended by Congress and could only lead to absurd consequences. When the Hobbs Act was before Congress stress was laid upon the fact that there was a lack of protection afforded farmers going to market across state lines. 91 Cong. Rec. 11911, or truck loads carrying cabbage and peas from South Carolina to New York, *Id.* at 11917, and there was even talk about night riders who destroyed tobacco crops, *Id.* at 11906.

Carrying the Court of Appeals' decision to its logical conclusion, one extorting money from a farmer in North Carolina whose tobacco crop was ultimately destined to be transported to all cities in the United States could be prosecuted in every district of the United States. Such a construction renders void the constitutional guarantee which finds sanction in Anglo Saxo jurisprudence against deportation to a strange vicinage for trial. Nor does this construction cure the narrow defect which Congress intended to remedy by passage of Section 3237.

Petitioner's interpretation of the act is consistent with analogous provisions of other statute and this act. Tested by the Court of Appeals' standards, if a fraudulent letter were mailed in Chicago destined for Boston but interrupted before it left the State of Illinois, the offender could be tried in either Illinois or Massachusetts, since according to the government's argument adopted by the Court of Appeals venue is coextensive with the area of intended operation. Certainly, no such result was intended by Congress, and indeed the act has been interpreted differently.

In *United States* v. *Ross*, 205 F. 2d, 619, 621, 10th Cir. 1953, the court stated:

> "The second paragraph of § 3237 must be read in the light of the Sixth Amendment to the United States Constitution, which provides that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed. We think there is a clear distinction between a deposit for mailing or delivery and the use of the mails. The *use* of the mails continues from the point of deposit to the point of delivery. Crimes involving the *use* of the mails are therefore continuing crimes, but the unlawful act defined in § 1461 is the deposit for mailing and not a *use* of the mails which may follow such deposit. That act is complete when the deposit is made and is not a continuing act. It does not involve a *use* of the mails."

The Elkins law (32 Stat. at L. 847, Chapter 708 U.S. Comp. Stat. Sup. 1907, p. 880) dealing with transportation in interstate commerce has also been interpreted to mean the actual carriage of an article in interstate commerce. *Armour Packing Company* v. *United States*, 209 U.S. 56.

The result reached by the Court of Appeals does violence not only to 18 U.S.C.A. 3237 but also to Constitutional venue safeguards. For this reason we respectfully submit review should be granted.

II.

A. The Hobbs Act, 18 U.S.C.A. Sec. 1951, is merely a Federal extortion statute proscribing extortion from persons engaged in interstate commerce and by reason whereof interstate commerce is affected.

B. Congress intended that such extortion should be governed by the common law principles as applied and defined under the laws of the State of New York.

C. Extortion is an *instantaneous* and not a *continuous* offense and hence venue can only be laid in the district where the extortion is committed although events preceding completion of the offense may be admissible in evidence merely for historical purposes.

Sec. 1951 Title 18 U.S.C. (hereinafter the Act) derives from the original Anti-Racketeering Act of 1934, 48 Stat. 979 and the amendatory Hobbs Act of 1946, 60 Stat. 420 and "is merely the creation of an extortion statute against those who extort money by force or violence from those engaged in interstate commerce." (78th Cong. Rec. 11402); *United States* v. *Kemble*, 198 F. 2d 889, 890 (3rd Cir. 1952).

When the Hobbs Act was under consideration by the House, Cong. Eberhacher inquired if the bill would change the statute in so far as robbery and extortion were concerned. Cong. Hancock replied:

> "The bill contains offenses for robbery and extortion which follows the offenses in the laws of the State of New York."

It was further stated that the bill merely creates the crime of robbery and extortion; that it is up to the government to prove beyond a reasonable doubt that the person charged has committed either robbery, or extortion before a conviction can be had; that "*mere threat does not*

constitute a crime. There must accompany that threat with an unlawful taking." 91 Cong. Rec. 11900, 11905, 11906, 11908. (Emphasis added.)

This becomes important when considering whether extortion is an *instantaneous* or *continuing* offense p. 14 *et seq.*

In *Nick* v. *United States,* 122 F. 2d 660, 661 (8th Cir. 1941) cert. denied. 62 S. Ct. 302, the court, in construing the original act, held:

> "The *gist* of the unlawful act is extortion. Extortion involves a state of mind as an element of having an offense under the act. Unless there is some form of violation (either physical or fear) there is no crime under the act."[1]

In short, we reiterate the words of Congressman Oliver, the sponsor of the original Anti Racketeering Act, that:

> "This is merely the creation of an extortion statute against those who extort money . . . from those engaged in interstate commerce." (78th Cong. Rec. 11402)

There are no common law offenses against the Federal Government and when Congress adopts common law crimes then such offenses are governed by common law principles. *Morrissett* v. *United States,* 342 U.S. 246; *United States* v. *Sutter,* 160 F. 2d 754, 7th Cir.; 14 Am. Jur. "Criminal Law" Sec. 15, even though the crime is coupled with some Federal element in order to sustain Federal jurisdiction. *U. S.* v. *Sutter,* 7th Cir. 1957, 160 F. 2d 754, 755.

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[1] The District Attorney contended at the trial "that the gist of this case is not the extortion, • • • • but the obstruction of commerce by extortion, • • • • and the venue, the point that gives this court jurisdiction, is where that commerce is to be affected, • • • •" R. 164. The trial court, too, so concluded, R. 170.

At common law intent is an inherent part of the crime of extortion—absent it there can be no offense. *Morrissett* v. *United States*, 342 U.S. 246, 72 Sup. Ct. 240; *United States* v. *Kemble*, 198 F. 2d 889, 897 (3rd Cir. 1952); *People* v. *Folignos*, 322 Ill. 304, 311 (1926).

Further as stated in 14 Am. Jur. "Criminal Law" Sec. 23, at page 782:

> "At common law a crime consists of two elements—namely, an evil intention and an unlawful action . . . the intent must exist at the time of the unlawful action for no subsequent felonious intention will render the previous act felonious."

The meeting at Pontiac between the defendant and Stout in April, 1952 (R. 43-45) was equivocal and accorded with the hypothesis of innocence.[1] At that time J. L. Cox and Sons of Raytown, Missouri had neither a contract nor the expectancy of a contract for the stringing of pipes. (R. 56) The Sinclair Company awarded a contract to Britton Brothers Contracting Company for stringing pipes from Forest City, Illinois to East Chicago, Indiana. Britton Brothers later sublet this contract to O. R. Burden Construction Company (R. 25, 78). The earliest that this contract came into existence was on May 12, 1952 (R. 28). The "storing of pipe" which was under a previous contract to Cox and the subject matter of the Pontiac meet-

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[1] The Court of Appeals held: "(t)hat the threatening statements made by the defendant to Stout on August 29, 1952 were extortive * * *. Those threatening statements, however, were made in the Northern District of Illinois and the alleged payments were made within the Missouri jurisdiction.

"As already shown, the only statement made by the defendant in the Southern District was at Pontiac when he said to Stout '* * * if you get the stringing, you come and see me before you start.' Undoubtedly this command or invitation referred to the stringing contract which Stout's firm at this time did not have." 228 F. 2d at 917.

ing, came to end without incident before the "stringing contract" was awarded (R. 56, 57, 62). Some time in July or August the sub-contractor, Burden, relet the contract to Cox after Cox had bid for the same (R. 19, 42, 56, 57, 79). Cox and Sons did not move any men or equipment until they got the subcontract from the subcontractor Burden (R. 30); therefore, the earliest that they could have moved any men or equipment was July or August 1952 (R. 30) so that in April 1952 the defendant could not be guilty of extorting money or property from J. L. Cox and Sons within the prohibition of Sec. 1951 of Title 18 U.S. Code, because J. L. Cox and Sons had no contract for the stringing of pipes and were not, in the words of Congressman Oliver, "engaged in interstate commerce." No intent existed at that time for any unlawful action, and, consequently, no subsequent felonious intent could retroactively supply the necessary prerequisite of criminal intent to extort from those engaged in interstate commerce. As we have said before, there could not be even an attempted extortion at that time within the purview of the Federal Act.

Mr. Chief Justice Vanderbilt in *State* v. *Welech*, 10 N.J. 355, 91 A. 2d 751, 760, 1952, stated the rule applicable to extortion as follows:

> "It is the well-settled rule that there can not be a conviction for an attempt to commit a crime unless the attempt if completed would have constituted a crime" . . . "As previously indicated, if the defendant had actually taken money under the circumstances alleged he would have committed extortion. The next step short of actually taking money is to demand it. The demand is the overt act supplying the attempt" . . .
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> "We recognize that to be guilty of an attempt to commit a crime a defendant must have intended to commit the crime itself." . . .

" . . . *Extortion and attempted extortion are not continuing offenses . . .The offense is complete with the taking and not before . . .*"

"Similarly, the offense of attempted extortion is committed (with the) demands (for) the payment of money . . . *The offense is complete with the making of the demand and not before* . . . If, as a result of the demand, payment is actually made . . . the intended crime of extortion is committed and the attempt is merged in the completed crime. If no payment is made and the demand for payment is repeated . . . the offender is guilty of a separate and second attempt to extort."

People v. *Franquelin*, 241 P. 2d 651, 654 (Cal. 1952) holds:

" . . . To commit the offense of attempt to commit extortion there must be a specific intent to commit the crime, and a direct ineffectual act done toward its commission. "It is true, as defendant argues, that preparation alone is not sufficient. The act 'must reach far enough towards the accomplishment of the desires result to amount to the commencement of the consummation.' *People* v. *Miller*, 2 Cal. 2d 527, 530, 42 F. 2d 308, 309, 98 A.L.R. 913. In the *Miller* case the court quoted from 1 Wharton's Criminal Law, 12th ed., p. 280:

> 'There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter.'

"Preparation is devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement toward the commission after the preparations are made. Defendant did more than planning or preparation. Up to the time he rang the doorbell on the night he was to re-

ceive the money it might be argued that his acts were equivocal. They were not thereafter. Preparation had left off and execution had commenced. From that time on fragments of the crime were committed; defendant's movements, without any equivocality, were made to complete his design."

Thus at common law the crime of extortion was an instantaneous and not a continuous crime. c.f. Black, Law Dictionary, "Variety of Crimes—Continuous Crimes."

As stated in *Armour* v. *United States,* 153 F. 1, 5:

> "A continuing offense is a continuous unlawful act or series of acts set on foot by a single impulse and operated by unintermittent force, however long a time it may occupy."

Wharton Cr. Law Vol. I, page 335, 12th ed. thus states the rule:

> "Since, however, the crime may be organized in one county, advanced in a second, and executed in a third, it is necessary to conceive the crime in question as broken up into several sections, committed in distinct jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists . . ."

III.

Briefly then, the crime of extortion or attempted extortion as denounced by the Act was not committed nor capable of commitment under the circumstances of the case, because the meeting was innocent in nature, no threat or demand was then made, nor was Cox & Sons then engaged in interstate commerce.

In *People* v. *Fowler,* 152 N.Y. Sup. 672, defendant by threat induced a contractor residing in another county to give him a campaign contribution. The check was delivered at the contractor's place of business and the defendant

thereafter carried it to the bank which cashed the check in another county. It was held that the latter county did not have jurisdiction of the prosecution for extradition for the reason:

> "It is obvious that none of these acts is a constituent element of the extortion; none of them constitutes any part of the offense." . . . "While these acts were steps taken by the defendant to realize the value of the check and could be shown on the trial, *they were nevertheless mere incidents in the history* of the check and not necessary, essential or indispensable to the consummation of the crime. The crime of extorting money could be proved without reference to these acts in New York County."

In *Murtagh* v. *Leibowitz,* 303 N.Y. 311, 101 N.E. 2d 753 (1951), the New York statute provided:

> "When a crime is committed, partly in one county and partly in another, or the acts or effects thereof, constituting, or requisite to the consummation of the offense, occur in two or more counties, the jurisdiction is in either county."

The lower court held that even if an innocent act were committed in one county and the crime later consummated in another county, venue might be laid in either place.

The Court of Appeals, in reversing, held (101 N.E. 2d 753, 755, 303 N.Y. 311 (1951)):

> "In effect, the court below, citing *People* v. *Mitchell* 49 App. Div. 531, 63 N.Y.S. 522, affirmed 168 N.Y. 604, 61 N.E. 182 and *People* v. *Hudson Valley Construction Co.,* 217 N.Y. 172, 111 N.E. 472, construed section 134 to mean that
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> "If, in order to convict a defendant, the People must prove not only a criminal act committed in one county but also an innocent act committed in another, the venue may be laid in either of the counties. We do not so construe or apply section 134."

"It was the common-law rule that every offense had to be inquired into, as well as tried, in the county where the offense was committed, see authorities collected in *People* v. *Hetenyi*, 277 App. Div. 310, 314, 98 N.Y.S. 2d 990, 994, affirmed 301 N.Y. 757, 95 N.E. 2d 819. So stringently was the rule applied, at common law, that where the alleged act was performed in part in one county and in part in another or others, venue was in neither county, and prosecution could not be had at all. To correct that weakness in the law, section 134 was passed in this State, as were its counterparts in other States. But that statute's coverage and purpose are plain from its heading: 'When a crime is committed partly in one county and partly in another.' "

The court concluded that where an offense were made up of several acts some of which were done in one county and some in another county that venue would not lie in either county where an act was committed unless such act "*was a component of the crime itself, made such by the legislature, and not* merely something which had, preliminarily, to be shown." (101 N.E. 2d 753, 756).

The first paragraph of Sec. 3237 Title 18 U.S.C.A. is based on Sec. 42 of the Judicial Code, Sec. 103, Title 28 U.S.C. 1940 ed. and derives from Sec. 731 of the Revised Stats. U.S. Comp. St. 1901, p. 585 and was originally part of the same section of the statute which defined conspiracy, 14 St. at L. 484, Ch. 169, U.S. Comp. Stat. 1901, p. 585, *Hyde* v. *United States*, 225 U.S. 347, 32 S. Ct. 793, 799. The *Hyde* case involved a conspiracy to defraud the United States by the securing of public lands located in California. The conspiracy was formed in California and the overt act was committed in Washington, D.C. where the prosecution took place. The Court stated (360):

"If the unlawful combination and the overt act constitute the offense, as stated in *Hyde* v. *Shine*, marking its beginning and its execution or a step to its execution, §731 of the Revised Statutes (U.S. Comp. Stat.

1901, p. 585) must be applied. That section provides that 'when any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.' This provision takes an emphasis of signification from the fact that it was originally a part of the same section of the statute which defined conspiracy,—that is, § 30 of the act of March 2, 1867 (14 Stat. at L. 484, chap. 169, U.S. Comp. Stat. 1901, p. 585)."

In *Lombardo* v. *United States*, 241 U.S. 73, 77, 36 S. Ct. 508, 510 this same section was considered by the court who held:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner as if it had been actually and wholly committed therein."

• • •

"Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done; or where it may be said there is a continuously moving act, commencing with the offender and hence ultimately consummated through him, as the mailing of a letter; or where there is a confederation in purpose between two or more persons, its execution being by acts elsewhere, as in conspiracy."

In *Conley* v. *United States*, 23 F. 2d 226, the defendants were apprehended in Detroit, Michigan, where they were found in possession of altered registered Liberty bonds, which were stolen at Greensboro, North Carolina. The defendants were brought back to North Carolina and

indicted in the United States District Court at Greensboro, North Carolina for altering Liberty bonds by erasing the names of the payees, and possession thereof in violation of Sec. 148 of the Penal Code, 18 U.S.C. Sec. 262, 265.

The Government contended that venue lay at the place where the bonds were stolen because that is where the crime was "begun." The court held the contention to be untenable and stated:

> "And while the intention may have been formed at that time (of stealing) to afterward make the alterations, yet we are of the opinion that even if such an intention could be properly concluded from the evidence in the case, it would not constitute such a beginning as is contemplated by section 1024 (28 U.S. C.A. Sec. 103)" . . .
>
> "The offense of having in possession the bonds in question with intent to defraud, might consist of distinct parts having different localities, and might constitute a continuously moving act, yet it is clear that the offense could not have begun until after the bonds had been altered."

That case is particularly applicable to the case at bar, because here Petitioner could not begin the crime of extortion against Cox and Sons until they had been awarded a subcontract for the stringing of pipes in interstate commerce—an event which did not take place until more than four months after the innocent meeting at Pontiac, Illinois.

In *United States* v. *Borow*, 101 F. Sup. 211, 214, defendant was charged in the United States District Court for the District of New Jersey in making false statements to the War Assets Administration. The false statement was prepared at Plainfield, New Jersey and delivered by the defendant to the office of the War Assets Administration in New York City. The government urged that the prepara-

tion of the letter in New Jersey was the beginning of the offense, and, hence, prosecutable in that district. The court held:

> "That alleged crime consisted of one single act, that is, the delivery to the government official in New York City of the letter containing the false statements, and no crime was committed merey in the preparation of the letter in New Jersey absent its delivery. Under such circumstances, Sec. 42 of the Judicial Code becomes inapplicable. *Reass* v. *United States,* 4 Cir., 1938, 99 F. 2d, 752, is a case in point."

The evidence in the case at bar clearly shows, however, that no threat was made in Pontiac. (Southern District of Illinois). As a matter of fact, there could have been no interference with interstate commerce at the time the meeting in Pontiac took place, since Cox did not at that time have any contract to do the work which the indictment alleges he was prevented from doing by defendant.

But extortion is not a continuing offense, since it is a completed crime at the moment the victim is put in fear by the extortioner. There is no crime until "the putting in fear" occurs. According to the evidence then, the extortion if it took place at all took place in Joliet (Northern District of Illinois). Whether the defendant intended to commit a crime when he met Mr. Stout in Pontiac is immaterial, arguendo, even preparation for the crime in Pontiac would not be sufficient to lay the venue there.

The case of *Reass* v. *United States,* 99 F. 2d, 752 makes this very clear.

> "On the other hand, a crime may lack continuity of performance and may consist of a single act which occurs at one time and at one place in which only it may be tried, although preparations for its commission may take place elsewhere. Such are offenses which involve the filing of formal documents, such as certificated or reports at a bar do, *supra; Wampler* v. *Snyder,*

62 App. D.C. 215, 66 F. 2d 195; *Bowles* v. *United States*, 4 Cir. 73 F. 2d 772. *In the Wampler* case the defendant placed an income tax report in the mail in the City of Washington for delivery to the Collector of Internal Revenue in Baltimore in accordance with the Statute, 26 U.S.C.A. § 2053, now 26 U.S.C.A. § 53, which required that the return 'shall be made' to the collector. It was held that a mere placing of the returns in the mail was not a compliance with the statute and that the words 'shall be made' are equivalent to the words 'shall be filed". See, also, *Rumely* v. *McCarthy*, 250 U.S. 283, 39 S. Ct., 483, 63 L. Ed. 983; *Henry* v. *Francestown Soap-Stone Co.*, C.C., 2 F. 78.

"The case at bar belongs, in our opinion, in the latter class. The statute on which the indictment is based was passed to protect the Federal Home Loan Banks from fraudulent attempts to secure favorable action on applications for loans and the like matters. The gist of the offense is the attempt to influence the corporation, as was held in regard to the companion section 8(a) of the Home Owners' Loan Act, 12 U.S. C.A. § 1467 (a); *United States* v. *Kreidler*, D.C., 11 F. Supp. 402; *Kay* v. *United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607, and communication of the false statements to the corporation constitutes the very essence of the crime. It is in this sense that the statute condemns the making of a false statement for the purpose of influencing the bank. The mere assembling of the material and its arrangement in a written composition containing the misrepresentations of fact can have no effect, and it is only when they are communicated to the lending bank that the crime takes place. It follows that the acts performed by the defendant in Wheeling, although preparatory to the commission of the crime, were no part of the crime itself. That took place entirely in Pittsburgh where the writing previously prepared was presented to the bank. We have no occasion in this case to consider whether the offense would have been cognizable in West Virginia, if the defendant had entrusted the application to the

mails in Wheeling for delivery to the bank in Pittsburgh, for, as the evidence shows, he took the application in person to Pittsburgh and presented it to the bank."

We contend that this situation is squarely within the rule of the *Reass* case. Even if it is contended that this offence is a separable crime and that it can be tried at either the place of the threat or the place where the money has been obtained neither of these events occurred in Pontiac (within the District where the trial was had.)

In *Palliser* v. *United States*, 136 U.S. 257, 10 S. Ct. 1034, the defendants were charged with violating Revised Statute United States 5, Section 51, by mailing a letter in New York addressed to a Postmaster at New London, Connecticut, inducing him to sell stamps on credit in violation of the Statute.

Mr. Justice Gray, after reviewing Revised Statute 731, the forerunner of Section 3237, nevertheless made this observation (10 S. Ct. at p. 1037):

> "In the case before us, the offense charged, being an offer of money or a tender of a contract for the payment of money contained in a letter mailed in New York and addressed to a Postmaster in Connecticut to induce him to violate his official duty. There might be doubt whether any offense against the cause of the United States was committed until the offer or tender was known to the Postmaster and might have influenced his mind."

Here the defendant alone has been charged with a substantive offense and therefore the rules applicable to conspiracy with respect to venue are not a criterion.

As Congressman Walters stated:

> "Mere threat does not constitute a crime. There must accompany that threat an unlawful taking."

91 Cong. Rec. 11908.

"Threat must be such as would ordinarily create alarm." 22 Am. Jr. Extortion and Blackmail, Sec. 20.

In April, 1952 at Pontiac, Illinois, there was no threat. The conversation created no alarm, nor could the crime of extortion against Cox and Sons in violation of Sec. 1951 of Title 18 U.S.C.A. be maintained for Cox and Sons had no contract for stringing and hence were not then engaged in interstate commerce. In short, the requisite affect on interstate commerce would be missing at the time and place and therefore the offense was not cognizable under Federal statutes. Viewed in any light—there was no fragmentary undertaking, no beginning of an offense, nor is a continuous offense involved. Accordingly, venue could not be asserted in the district embracing Pontiac, Illinois—the district wherein the defendant was tried and convicted.

In *Swift* v. *United States,* 196 U.S. 375, 25 S. Ct. 276, 281, it is stated:

"Not every act that may be done with intent to produce an unlawful result is unlawful or constitutes an attempt. It is a question of proximity and degrees. The distinction between mere preparation and attempt is well known in the criminal law."

What Mr. Justice Holmes said in dissenting in the *Hyde* case is particularly applicable here:

"But combination, intention, and overt act may all be present without amounting to a criminal attempt, —as if all that were done should be an agreement to murder a man 50 miles away, and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offense." (810).

Mr. Justice Holmes again observed that the provision of the statute "Merely affords a locus penitentiae" and stated:

"I can think of no other case in which it would be argued that an act constituting no part of the crime charged draws jurisdiction to the place where it is done. * * * It would be an amazing extension of even the broadest form of fiction if it should be held that an otherwise innocent overt act done in one state drew to itself a conspiracy in another state to defraud people beyond its own boundaries." (p. 810).

What we have already said shows that the Court of Appeals was also in error in holding that (228 F. 2d at 917):

"The statute involved refers to threats 'in furtherance of a plan or purpose.' The situation, therefore, gives rise to a strong inference, to which the jury had a right to subscribe, that the plan or purpose to extort had its inception in Pontiac, was carried forward at Joliet and was later consummated in Kansas City, Missouri. Under this view it would seem that the first paragraph of Title 18 U.S.C.A. Sec. 3237, is applicable. It provides:

" * * * any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

For there was no evidence of any plan or purpose to violate the statute when the parties met at Pontiac in April, 1952, nor were there any unlawful acts of commission or threats made at that time and place. Further the indictment charged "*extortion*" and was not grounded upon any other illegal conduct denounced by the Act, Compare, Indictment (R. 4) with the Act.

The Court of Appeals found that:

"Stout (one of the partners of J. L. Cox & Sons) met the defendant for the first time in the Labor Temple at Pontiac, Livingston County, Illinois, in the late spring or early summer of 1952. At that time

the partnership had a contract for the unloading and was engaged in negotiation for a contract for the stringing operation.

"Stout met the defendant for the purpose of securing permission to use his own drivers for the unloading operation, which was granted by the defendant. At that time defendant stated to Stout, 'You go ahead with the unloading, but if you get the stringing, you come and see me before you start.' After Cox & Sons had been awarded the contract for the stringing operation, Stout, after making an appointment by telephone, went to the Office of the defendant in Joliet, Illinois, on August 29, 1952."

It was at the August 29 meeting in Joliet, Illinois that the defendant allegedly made the extortive demand. 228 F. 2d at 916.

The Court of Appeals recognized that no extortive demands were made at Pontiac, Illinois which was within the Southern District of Illinois where the case was tried. 228 F. 2d at 917.

The Court of Appeals, however, in treating with the Joliet meeting stated:

"Defendant argues that this was an innocent statement barren of any criminal connotation. This is a plausible view when the statement is considered in isolation and irrespective of that which followed. Its purpose, however, was clearly characterized by the threats which were subsequently made at Joliet. In fact, it is reasonable to believe that defendant's statement at Pontiac was the motivating factor which caused Stout to visit defendant at Joliet where the threatening and coercive statements were made." 228 F. 2d at 917.

Stout testified that he arranged this meeting with the defendant at which time the defendant was told that Cox & Sons had a small amount of pipe for storing (unloading)

which was necessary to haul by truck and requested permission to use the firm's regular drivers. Defendant "said the job didn't amount to much, go ahead." Stout" told him (Cox & Sons) were trying to get the contract to string the pipe. (Defendant said) 'you go ahead with the unloading but if you get the stringing you come and see me before you start.'" That terminated the conversation and Cox & Sons did not contact the defendant again until August 29, 1952. R. 44, 45.

The storing job came to an end in about a week, R. 57 and before the award of a subcontract for a stringing of the pipe (R. 56) which was the subject matter of the indictment. There is no evidence that any of the parties regarded this earlier conversation as a threat or an extortive demand.

The defendant's uncontradicted testimony was to the effect that Stout told him that Cox & Sons were unloading some pipes for Sinclair and were "going to have to use some truck drivers." R. 93. Defendant told Stout that he did not know if drivers were available but that Stout could bring his own drivers into the territory. Stout then told him that they were figuring on a job to string pipe for Burden but that they would not know until later if they would get the job and inquired about using local men. Defendant then told him that if they were available he would put them on. Otherwise they would have to bring in their own men. R. 94. It was for this reason that the defendant suggested to Stout that if and when Cox & Sons secured a contract for the stringing of pipes that he come and see him about the availability of truck drivers. We have already noted that Cox & Sons moved no men or material until after they had been awarded a subcontract from Burden and long after the storing contract—being the subject matter of the Pontiac meeting—had been concluded.

In this connection it is significant to note that the defendant's tendered instruction 11 regarding circumstantial evidence was denied by the court. R. 123. Because it was the contention of the district attorney that the government was not relying upon any circumstantial evidence. R. 136. The giving of the instruction was clearly erroneous if the Court of Appeals was correct in the conclusion that the meeting in Pontiac "gives rise to a strong inference, to which the jury had a right to subscribe, that the plan or purpose to extort had its inception in Pontiac, was carried forward at Joliet and was later consummated in Kansas City, Missouri." 228 F. 2d at 913.

CONCLUSION.

It is respectfully submitted that the plain meaning of the Act (Sec. 1951 Title 18 U.S.C.A.) has been distorted by the construction placed upon it by the Court of Appeals. So, too, has violence been done to Constitutional safeguards in the construction placed upon Section 3237 of Title 18 U.S.C.A. and Federal Rules of Criminal Procedure, 18, by disregarding the *use* doctrine. It leaves the law in a rather ambiguous state which ought to be resolved by this court both in the interest of an orderly and uniform administration of criminal justice throughout the United States and in the exercise of its supervisory powers over Federal criminal procedure. *Offut.* v. *United States,* 348 U.S. 11. This court has long ago held (*United States* v. *Brewer,* 139 U.S. 278):

> " • • • Laws which create crimes ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid; before a man can be punished his case must be plainly and unmistakably within the statute."

For the reasons aforesaid and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit, limited to the first question presented in said petition.

Respectfully submitted,

I. HARVEY LEVINSON,
FRANK J. MCADAMS, JR.,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

I. HARVEY LEVINSON,
Counsel for Petitioner.